IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 955 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DALATBHAI PREMABHAI PATEL - Appellant(s)
Versus
STATE OF GUJART - Respondent(s)

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Appearance :
MR ND NANAVATI SR.ADVOCATE FOR NANAVATY ADVOCATES for Appellant.
MR KT DAVE ADDL. PUBLIC PROSECUTOR for Respondent.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 19/01/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. The appellant ('the accused' for short) was charged and tried by the learned Additional Sessions Judge, Surat, in Special Case No.5 of 2001 for commission of the offences punishable under Sections 306, 376 (2) (b), 376B and 506 (1) of the Indian Penal Code ('IPC' for short) and under Section 3 (1) (xii) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 ('the Atrocities Act' for short) on the accusation that he had forcibly committed rape on the victim – deceased prosecutrix Ramilaben, who belonged to Scheduled Caste, gave criminal intimidation and abetted her to commit suicide. At the end of the trial, as the prosecution has not been able to establish the offence of abetment to commit suicide under Section 306 IPC against the accused, he has been acquitted of the said offence whereas the accused was found guilty of other offences with which he was charged, he has been convicted vide judgment and order dated 12.12.2001 and sentenced to

suffer R.I. for ten years and fine of Rs.500/- i.d., S.I. for 3 months for the offence under Section 376 (2) (b) IPC, R.I. for two years and fine of Rs.500/- i.d., S.I. for 3 months for the offence under Section 376B IPC, S.I. for 3 months and fine of Rs.300/- i.d., S.I. for 15 days for the offence under Section 506 (1) IPC and R.I. for 6 months and fine of Rs.500/- i.d., S.I. for 1 month for the offence under Section 3 (1) (xii) of the Atrocities Act. It has also been ordered that all the substantive sentences shall run concurrently.

1.1. The accused, aggrieved by the judgment and order of conviction and sentence, has filed instant appeal with the aid of Section 374 of the Code of Criminal Procedure, 1973 ('the Code' for short).

2. Since the facts of the case have been detailed in the judgment of the trial court, it is not necessary for us to repeat the same all

over again in verbatim and in detail in this judgment. However, the basic facts which are necessary to be discussed in this appeal, as disclosed from the FIR and the dying declaration and unfolded during the trial, are as under:

3.1. The prosecution case has begun from the dying declaration dated 7.11.2000 recorded by the Executive Magistrate and pursuant thereto a complaint was lodged. The said dying declaration is at Ex.15 and the said complaint is at Ex.24. In the said complaint it is, inter alia, alleged that the deceased Ramilaben Ramjibhai was employed as a labourer in the agriculture farm situated at Athwa Lines, Surat. It is alleged that Ramjibhai, husband of deceased Ramilaben, was employed as a watchman in the said farm before three years.

3.1. Since about four months prior to the filing of the complaint, deceased Ramilaben was employed with a view to take care of the standing crop in the field on the daily wages of Rs.40/-

It is also alleged that prior to four months of the filing of the complaint, at about 4.30 P.M., when deceased Ramilaben was working in the field, the accused had approached her and started talking with her. It is further alleged that during the course of conversation, the accused pushed her in the farm and despite her resistance, forcibly he committed sexual intercourse with her. Thereafter the accused threatened her that she would be expelled from the farm and that her husband would be taken to task if she discloses about the said incident and hence she kept silence. It is further alleged that since about 2 to 3 days back, the accused once again started making demand for the sexual favour from deceased Ramilaben. However, apprehending that the accused would again commit sexual intercourse with her and that the same would be disclosed to her husband and the same would affect her character, she decided that it would be better to die rather than to live with stigma. As per the further case of the prosecution, it is because of this thought that

the deceased poured kerosene on her by herself in the noon time when her husband was sleeping at his residence and set herself ablaze. It is also alleged that when the deceased started getting burns, she raised loud cry and on hearing her cry, her husband rushed to extinguish the fire and attempted to save her. It is further alleged that in the course of extinguishing the fire and saving her, Ramjibhai, husband of the deceased, received burn injuries on his hands and on other parts of his body. Thereafter she was admitted in Mahavir Hospital, Surat. It is the case of the prosecution that since the deceased could not bear the alleged repeated demand for sexual favour in pursuance of the alleged sexual intercourse the accused had with her about four months back, she had attempted to commit suicide.

3.2. The complaint for the aforesaid incident was filed at Umra Police Station, Surat for commission of the offences under Sections 376 (2) (b), 376B and 506 (1) IPC and under Section 3 (1) (xii) of the Atrocities Act. Pursuant to the

lodging of the complaint, offence was registered against the accused for commission of the offences as alleged in the complaint and investigation was put into motion. Statements of the witnesses were recorded. Panchnama of the place of offence and seizure panchnama of the house of the accused was drawn. During the course of investigation, on 9.11.2000, the complainant- Ramilaben died and, therefore, offence under Section 306 IPC was added in the complaint. Thereafter inquest on the dead body of Ramilaben was held and her dead body was sent for post-mortem examination. The investigating officer obtained the post mortem report, collected muddamal articles and sent them for analysis to FSL and received the report from the FSL after analysis. At the end of the investigation, as sufficient incriminating evidence was found against the accused, he was charge-sheeted for the offences under Sections 306, 376 (2) (b), 376B and 506 (1) IPC and under Section 3 (1) (xii) of the Atrocities Act in the court of the learned Chief Judicial Magistrate,

Surat.

3.3. As the offences under Sections 306, 376 (2) (b), etc., are exclusively triable by the Court of Sessions, the learned Chief Judicial Magistrate committed the case to the Court of Sessions, Surat.

3.4. The learned Additional Sessions Judge, Surat to whom the case was made over for trial, framed charge against the accused for commission of the offences under Sections 306, 376 (2) (b), 376B and 506 (1) IPC and Section 3 (1) (xii) of the Atrocities Act. The charge was read over and explained to the accused. The accused pleaded not guilty to the charge and claimed to be tried and thereupon the trial court put him to trial in Special Case No.5 of 2001.

3.5. To prove the culpability of the accused, the prosecution has examined as many as 12 witnesses and relied upon their oral testimonies, the details of which have been given in paragraph

4 of the impugned judgment and order. They are as under:

P.W. No.	Name	Status of witness	Ex. No.	Page Nos.
1.	Ramjibhai Ditabhai	Husband of deceased Ramilaben – hostile	8	17-19
2.	Rinaben Ramjibhai	Daughter of deceased Ramilaben – hostile	9	20-21
3.	Ravubhai Punani	Companion of the accused – hostile	10	22-23
4.	Bhagwatibhai Hirabhai	Companion of the accused – hostile	11	24-25
5.	Mukesh Ramjibhai	Executive Magistrate who recorded D.D.	12	26-29
6.	Vijaybhai Hasmukhbhai	Panch witness of the panchnama of the field – hostile	21	42
7.	Maganbhai Jesingbhai	Panch witness of the panchnama of the field – hostile	22	44-46
8.	Dinesh Dipchandbhai	P.S.I.	23	44-46
9.	Dr. Pradipbhai Raghuvirsingh	Doctor who treated the deceased at Mahavir Hospital	29	59-60
10.	Dr. Jayeshkumar Patel	Doctor who performed post mortem of the deceased	31	61-62

P.W. No.	Name	Status of witness	Ex. No.	Page Nos.
11.	Indrajitsinh Raj	Investigating Officer	35	72-73
12.	Gordhanbhai Jesingbhai	Investigating Officer	37	78-79

3.6. To establish the charge against the accused, the prosecution has also produced a number of documents and relied upon the contents of the same, the details of which have been given in paragraph 5 of the impugned judgment and order. They are as under:

Sr. No	Particulars	Ex.No	Page No
1.	Dying declaration of deceased Ramilaben	15	32-33
2.	Panchnama of the place of offence	16	34-36
3.	Seizure panchnama prepared at the house of the accused	17	37
4.	Inquest panchnama	18	38-39
5.	Panchnama with regard to the physical condition of the accused	19	40
6.	Caste Certificate of deceased	20	41
7.	Complaint	24	47-49
8.	Yadi sent for registering the offence	25	50
9.	F.S.L. report	27	52-56

Sr. No	Particulars	Ex.No	Page No
10.	F.S.L. report	28	57-58
11.	P.M. notes	32	63-70
12.	Certificate showing cause of death	33	71
13.	Panchnama showing the place of offence	36	74-77

3.7. After recording of the evidence of the prosecution witnesses was over, the trial court explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement under Section 313 of the Code. In his further statement he denied the case of the prosecution and stated that he has been falsely implicated in the case. However, he has neither led any evidence nor did he examine any witness in support of his defence.

3.8. On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial court held that the prosecution has not been able to establish the offence of abetment to commit

suicide under Section 306 IPC against the accused. However, the prosecution has been able to prove the complicity of the accused for commission of the offences under Sections 376 (2) (b), 376B and 506 (1) IPC and under Section 3 (1) (xii) of the Atrocities Act and accordingly convicted and sentenced him for the said offences, to which reference is made in earlier paragraph of this judgment, which has given rise to instant appeal at the instance of the accused.

4. Mr. Nirupam D. Nanavati, learned Senior Advocate for Nanavati Advocates for the accused, has contended that the impugned judgment and order is passed without any evidence on record. He has further contended that the trial court has committed an error in not appreciating the facts and the statements of the witnesses and also the evidence led by both the sides. He has emphasised that the deposition of the husband of deceased Ramilaben to the effect that the deceased used to go for work during day time would clearly show that if at all any rape was committed on the

deceased it would be during the day time when many other workers would be working in the said field which fact can also be seen from the evidence on record but the same was not appreciated by the trial court. It is also pointed out by him that relatives of the deceased have turned hostile and they have not supported the prosecution case. Notwithstanding this fact, the trial court has convicted the accused merely relying upon the dying declaration and the complaint. According to him, it is true that in the dying declaration the deceased had stated about the sexual harassment meted out to her by the accused and she was tolerating the same as the accused was her superior officer and taking advantage of his official position he induced her to have sexual intercourse which, according to him, would not amount to rape as defined under Section 375 IPC as there was no force or compulsion on the part of the accused for having sexual intercourse with the deceased. He has also emphasised that according to the evidence of the husband of the deceased, though he has been

declared hostile, he has, inter alia, testified that he came to know about the sexual intercourse committed by the accused with his wife but she had assured him that such incident would not be repeated in future and, therefore, the charge of rape prior to four months, as narrated by the deceased in her dying declaration, is an after-thought and merely because of frustration and apprehension that her image in the society would be tarnished, she gave version in the dying declaration wrongly involving the accused. He has also emphasised that looking to the burn injuries sustained by the deceased, it was not possible for her to give dying declaration and, therefore, reliance placed by the prosecution on two documents i.e., dying declaration as well as her complaint which has also become dying declaration after her death, cannot be believed. Lastly, it is asserted by him that if we read the dying declaration as well as the complaint, they reveal that she was a consenting party to the sexual intercourse. Since the alleged sexual intercourse was committed by the accused with the deceased

and her husband came to know about the same, she apprehended that her image in the society would be tarnished and, therefore, she narrated a story of committing rape on her by the accused and thereafter by pouring kerosene on her, she set herself ablaze.

4.1. Alternatively it is submitted by Mr. Nanavati that as the evidence on record reveals, at the most it can be said that commission of the offence under section 376B IPC is made out and, therefore, the accused can be sentenced for a maximum punishment of RI for five years and fine and in instant case the accused has already undergone imprisonment for more than six years. He, therefore, submitted that the impugned judgment and order of conviction and sentence deserves to be quashed and set aside and the accused may be acquitted of the offences under Sections 376 (2) (b) and 506 (1) IPC and under Section 3 (1) (xii) of the Atrocities Act by holding him guilty for commission of the offence under Section 376B IPC and since the accused has

already undergone imprisonment for more than six years, and since the trial court has sentenced the accused to undergo RI for 2 years and fine of Rs.500/- i.d., S.I. for 3 months which period is already over, the appeal may be partly allowed and the accused may be ordered to be released from jail.

5. Per contra, Mr. K.T. Dave, learned Addl. P.P. for the respondent – State of Gujarat, has contended that no interference is called for in the impugned judgment and order of conviction and sentence as the judgment and order passed by the trial court is just and proper. He has further contended that no case is made out by the accused before this Court to take a view contrary to the view taken by the trial court. According to him, it is true that all the witnesses have turned hostile but that fact itself, ipso facto, would not absolve the accused of the charge levelled against him as there is consistent evidence in the form of dying declaration recorded by the Executive Magistrate and a complaint recorded by

the police officer which has also become a dying declaration on demise of Ramilaben wherein she has raised an accusing finger against the accused and stated that the accused had committed rape on her prior to four months of filing of the complaint and repeatedly he asked for sexual favours from her. Mr. Dave has also asserted that the accused was a public servant and taking advantage of his position, he not only seduced her to have sexual intercourse with her and forcibly ravished her and, therefore, both the offences under Sections 376 (2) (b) as well as Section 376B IPC have been proved against the accused. After committing rape on the deceased, the accused gave threat to her and, therefore, offence under Section 506 (1) IPC is also proved. Deceased Ramilaben belonged to Scheduled Caste and, therefore, the offence under Section 3 (1) (xii) of the Atrocities Act is also established. Mr. Dave, therefore, submitted that in the facts and circumstances of the case, no lenient view can be taken. According to him, for the offence under Section 376 (2) (b) IPC, RI for ten years

has been imposed upon the accused by the trial court which is just and proper as it is the minimum sentence for commission of the said offence. According to him, the appeal lacks merit and deserves to be dismissed. He, therefore, urged to dismiss the appeal.

6. We have considered the submissions advanced by Mr. N.D. Nanavati, learned Senior advocate of the accused and Mr. K.T. Dave, learned APP for the respondent - State of Gujarat. We have also perused the impugned judgment and order. We have also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

7. At the outset, for deciding the accusation against the accused, it is pertinent to point out that all the witnesses who are near and dear relatives of the deceased have turned hostile and they have not supported the prosecution case,

therefore, the only evidence which is required to be examined by this Court is the dying declaration of the deceased recorded by the Executive Magistrate and the complaint recorded by the police officer which has also become dying declaration of the deceased after her death.

8. In this connection, we shall first examine the dying declaration of deceased Ramilaben recorded by the Executive Magistrate.

9. P.W.5, Mukesh Ramjibhai, Executive Magistrate, Ex.12, at page 26 to 29 of the paper book, has, inter alia, testified that on 7.11.2000 he was serving as Zonal Officer as well as Executive Magistrate at Surat. He received a police yadi at about 4.15 P.M. for recording a dying declaration. He, therefore, went to Mahavir Hospital. He has testified that since there was no doctor present with the patient, he himself ascertained from the deceased as to whether she was able to speak and during inquiry it was found that she was able to speak. He, therefore,

started asking questions. He has further testified that the deceased had stated before him that prior to four months, the accused, serving as a clerk in the agriculture farm, had ravished her but she did not lodge complaint before the police nor did she inform about it to her husband. Thereafter prior to 2/3 days of the incident, the accused again demanded to have sexual intercourse with her. She also stated before him that as the accused was repeatedly demanding to have sexual intercourse with her, she herself poured kerosene on her and set her ablaze. The said dying declaration is at Ex.15. Beneath the said dying declaration the thumb impression of the deceased was obtained by him. On the basis of the said dying declaration, police has recorded the complaint as per the narration given by the deceased.

10. The prosecution has thereafter examined P.W.8, Dinesh Dipchandbhai, PSI, Ex.23, at page 44 to 46 of the paper book. He has testified that he recorded the statement of the deceased and

obtained her thumb impression at the bottom of her statement. He has further stated that he recorded the statement of the deceased as narrated by her. The said complaint is at Ex.24.

11. It my be noted that in the complaint also deceased Ramilaben narrated similar version which she had stated in the dying declaration recorded by the Executive Magistrate, at Ex.15. This complaint has also become the dying declaration of deceased Ramilaben after her death.

12. A close scrutiny of both these documents, dying declaration Ex.15 recorded by the Executive Magistrate and the complaint Ex.24 recorded by the police which has also become her dying declaration as injured Ramilaben died after recording of the complaint, it cannot be disputed that the incident alleged in both these documents did take place prior to four months in the agriculture farm. But the question that would arise for consideration of this Court is whether the deceased was ravished by the accused forcibly

or she had given implied consent as the accused was her superior officer and had taken the advantage of his official position under the pretext that if she would not succumb to his demand, her husband would be thrown out of the job and if she would report the incident to her husband, he would be put to task. If there was no threat from the accused, she would have immediately shouted and raised voice and she would have resisted and in that situation, as it was day time, other female workers who were working in the farm would have assembled there and the accused would have been caught red-handed while committing rape on the deceased. But the deceased helplessly succumbed to the accused as he was in a position to make her husband jobless if she had shown any resistance to the sexual advancement of the accused. Thus, the accused being a public servant, took undue advantage of his official position and induced her to have sexual intercourse with him.

13. In light of the aforesaid factual scenario,

if we examine the evidence of P.W.1, Ramjibhai Ditabhai, husband of deceased Ramilaben Ex.8, at page 17 to 19 of the paper book, the real picture would emerge. It is true that he has turned hostile. However, as per the settled principles of criminal jurisprudence, entire evidence of a hostile witness cannot be totally washed off but the relevant portion of the deposition of a hostile witness can be considered. After declaring Ramjibhai Ditabhai hostile, he was cross-examined by the learned APP. During the course of his cross-examination, he has inter alia denied to have given statement to the investigating officer to the effect that the deceased herself poured kerosene on her body and ablaze because she had an illicit relation with the accused who was serving as a clerk in the agriculture farm and the said talk was going on in the society and his children were also asking him similar question as to why the accused was coming to their house regularly. He has further denied to have given statement to the investigating officer to the effect that he tried

to verify the truth from his wife and asked her whether she had illicit relation with Dalpatbhai, the accused and at that time she admitted that she had illicit relation with the accused and told him that the accused committed sexual intercourse with her on four occasions. Thereafter she had given assurance that similar mistake would not be repeated in future and he also told her that in future if the accused makes any sexual advancement, she should inform him. He has stated the aforesaid version in the police statement but he has resiled from it while testifying before the court. But the said contradiction has been proved by the evidence of the investigating officer. Therefore, there is no reason to totally brush aside the evidence of this witness in its entirety.

14. A conjoint reading of both these documents i.e, dying declaration recorded by the Executive Magistrate, Ex.15, and the police complaint which has also become her dying declaration, Ex.24, along with the oral testimony of P.W.1, Ramjibhai

Ditabhai,Ex.8, it is clear that the alleged incident did take place in the agriculture farm prior to four months of the death of Ramilaben. The said incident of sexual intercourse was never conveyed to anybody by the deceased under the pretext that the accused being her superior officer would throw away her husband and herself out of the job and because of the repeated demand by the accused for having sexual intercourse with her, she apprehended that her image would be tarnished in the society and under that apprehension she committed suicide.

15. In aforesaid view of the matter, according to us, the said act of the accused is not 'rape' within the meaning of Section 375 IPC. However, the said act is an offence punishable under Section 376B IPC as the accused was a public servant and a superior officer. It is an admitted fact that the accused was a superior officer in the rank of a clerk and he was a public servant at the time of the incident and the deceased was a daily wager. The accused being a public

servant, took advantage of his official position and induced and seduced the deceased who was in his custody as such public servant or in the custody of the public servant subordinate to him, to have sexual intercourse with her. The said sexual intercourse does not amount to the offence of rape shall be punishable with imprisonment of either description for a term which may extend to five years and shall also be liable to fine. So far as the charge for commission of the offence punishable under Section 3 (1) (xii) of the Atrocities Act is concerned, as held in earlier paragraph of this judgment, the accused was a public servant at the relevant time and was the superior officer of the deceased and he was in a position to dominate the will of the deceased who belonged to a Scheduled Caste and used that position to exploit her sexually to which she would have otherwise agreed. Therefore, complicity of the accused for commission of the offence under Section 3 (1) (xii) of the Atrocities Act is established and he is held guilty for commission of the offence under

section 3 (1) (xii) of the Atrocities Act and is rightly convicted and sentenced for commission of the said offence.

16. In view of the foregoing discussion, according to us, the prosecution has not been able to prove the charge against the accused for commission of the offences under Sections 376 (2) (b) and 506 (1) IPC but the prosecution has been successful in establishing the offence under Section 376B IPC as well as under section 3 (1) (xii) of the Atrocities Act against the accused. Therefore, the impugned judgment and order convicting the accused for the offences punishable under Sections 376 (2) (b) and 506 (1) IPC deserves to be quashed and set aside whereas the impugned judgment and order convicting the accused for the offence under Section 376B IPC and under section 3 (1) (xii) of the Atrocities Act deserves to be confirmed and maintained.

17. The trial court has imposed RI for two years and fine of Rs.500/- i.d., S.I. for three months

for the offence under Section 376B IPC and R.I. for six months and fine of Rs.500/- i.d., S.I. for one month for the offence under section 3 (1) (xii) of the Atrocities Act. The punishment prescribed for commission of offence under Section 376B is imprisonment of either description for a term which may extend to five years and also fine whereas the punishment prescribed for commission of offence under section 3 (1) (xii) of the Atrocities Act is imprisonment for a term which shall not be less than six months but which may extend to five years and with fine. As stated in the foregoing paragraphs of this judgment, the accused has already undergone imprisonment for more than six years. In these circumstances, the appeal deserves to be allowed in part.

18. For the foregoing reasons, the appeal succeeds in part and accordingly it is partly allowed. The impugned judgment and order dated 12.12.2001 passed by the learned Additional Sessions Judge, Surat in Special Case No. 5 of

2001 convicting and sentencing the accused for commission of the offence under Sections 376 (2) (b) and 506 (1) IPC is quashed and set aside and he is acquitted of the said offences whereas the impugned judgment and order convicting the accused for commission of offence under Section 376B IPC and under Section 3 (1) (xii) of the Atrocities Act is confirmed and maintained. Since the trial court has imposed sentence of RI for two years and fine of Rs.500/- i.d., S.I. for three months for commission of the office under Section 376B and the maximum sentence for commission of offence under Section 376B being imprisonment upto five years and fine and the trial court has imposed sentence of R.I. for six months and fine of Rs.500/- i.d., S.I. for one month for commission of offence under Section 3 (1) (xii) of the Atrocities Act which is the minimum sentence prescribed for commission of the said offence and in the event of imposing the maximum punishment on the accused which is imprisonment upto five years and fine and in that event also since the accused has already

undergone imprisonment for more than six years and as he is acquitted of other offences with which he was charged, the jail authorities are directed to release the accused forthwith if his presence is not required in connection with any other case.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

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